for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office↦ Dean Trebesch, Maricopa County Public Defender

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Proposition 200

By Russ Born
Training Director

Why did Proposition 200 pass? Perhaps the public was tired of how the law enforcement community and the prosecutor's office has handled non-violent drug offenders. *"Do Drugs, Do Time,"* is ignored by the reality that thousands of law-abiding, lower, upper and middle-class families know someone, usually close and dear to them, who has been seduced and enslaved by drugs. They know through personal experience that prison is not the preferred method of treatment.

The public, being less politically motivated than our legislators and elected county attorneys, decided that a change was in order. If politicians had been listening, they could have brought about a less drastic change, tempering some of the more controversial provisions of Proposition 200. However, unlike some politicians who belittled and chastised the voters, I salute them! Not because I agree with Proposition 200, but because the voters showed courage and a willingness to try something different in our endless battle against drugs! They are not giving up the fight. They are just changing the way part of the battle is going to be fought.

Now on to Proposition 200, or should I say the the Drug Medicalization, Prevention and Control Act of 1996. This article is not intended to be a thorough analysis of every provision of the statute. It is, however, a discussion of particular provisions that may impact our clients. There are at least two areas of Proposition 200 that may have an immediate impact on clients we represent. Both are contained in amended Title 13, Chapter 9, Arizona Revised Statutes §13-901.01. Since this article is intended to be a guide, it would be useful to review Prop 200 (see attachment), in conjunction with reading this article.

Subsection A makes simple possession or use of a controlled substance as defined in §36-2501, a probationable offense. It mandates that the court place the defendant on probation eliminating prison as a sentencing option.

> "The court ***shall*** suspend the imposition or execution of sentence and place such person on probation."

(cont. on pg. 2) ☞

There are exceptions to this probation mandate and they are laid out in subsection B, C, and G of §13-901.01. Subsection B eliminates "any person who has been convicted or indicted for a violent crime as defined in §41-1604.14" from being eligible for probation under the guidelines set out in §13-901.01. It does not eliminate probation as a sentencing option, it simply does not allow the defendant to take advantage of the special provisions of §13-901.01. Therefore, any client who cannot receive probation under §13-901.01 may still be eligible for probation under the old Title 13, Chapter 34. However, under Chapter 34, they are subject to a possible prison sentence.

This leads to two questions: who is a non-violent offender and who comes under the purview of Proposition 200.

What is a Violent Crime?

Title 41, Chapter 11, Arizona Revised Statutes was amended by Proposition 200 to include §41-1604.14 which defines Violent Crime. Under subsection B, a violent crime includes "any criminal act which results in death or physical injury or any criminal use of weapons or dangerous instruments." A potential issue here is that the statute does not say "serious" physical injury, just physical injury. Under §13-105 (29), "Physical injury" means the impairment of physical condition. Does a client's previous misdemeanor conviction for simple assault where he bloodied someone's nose, prevent him from qualifying as a non-violent offender? If strictly interpreted, maybe! Yet, because "physical injury" is used in the same context as death, weapons and dangerous instruments, it can be argued that the authors meant physical injury to be "serious physical injury", not just a scratch or a bruise. Additionally, in §13-901.01(B), the phrase "convicted or indicted for a violent crime" seems to imply a felony conviction. Indictments usually relate to the commencement of a felony prosecution. Infliction of "serious" physical injury, of and by itself, is a basis for a felony indictment.

What if a defendant has prior non violent felony convictions? Is he eligible for sentencing under §13-901.01? If the new charge is one for personal possesion or use of a controlled substance, it appears that §13-901.01. is applicable and the defendant must receive probation. This is based upon the language used in §13--901.01(A) "*Notwithstanding any law to the contrary*, any person who is convicted of the personal possession or use of a controlled substance as defined in §36-2501 shall be eligible for probation. The court *shall*... place such persona on probation." Any argument by the state that the drafters of the statute did not consider the issue of prior felony convictions is nullified by §13-901.01(B).

Assume, however, a defendant has no past violent criminal behavior, and possessed drugs for personal use only. Certainly, he escapes disqualification under subsection C which states that possession for sale, production, manufacturing or transportation for sale is not personal possession or use.

Is Proposition 200 Retroactive?

Does it matter when the crime was committed, when defendant plead guilty or when he was found guilty? Is Proposition 200 applicable to all pending cases and probation violation cases now before the superior courts and to anyone who was sentenced after the effective date of December 6, 1996 at 12:00 p.m.? The answer depends on whether Proposition 200 or portions of the proposition are retroactive or prospective in application.

This distinction between "substantive" and "procedural" plays an important role in retroactive application.

An analogy to the Victims' Rights Amendment is appropriate. When discussing the above issues with Chuck Krull and Christopher Johns of our Appellate Division , Chuck pointed out that on the day the Victim's Rights Amendment went into effect, our interviews with victims ended. Christopher recalled that the courts also held that Victim's Rights applied retroactively even where interviews with the victims had been ordered by the trial court before the Victim's Rights Amendment was in effect. See *State v. Warner*, 168 Ariz. 261, 812 P.2d 1079 (1990). The appellate court in *Warner* ruled that the Victim's Rights Amendment was procedural in nature because it did not affect a defendant's right to cross-examine witnesses at trial. The amendment only impacted defendant's ability to interview witnesses before trial which is an issue of discovery, not an issue involving vested or substantive rights.

This distinction between "substantive" and "procedural" plays an important role in retroactive application. Under A.R.S. §1-244 "No statute is retroactive unless expressly declared therein." An exception is made if the statute or amendment is procedural in nature. In that instance a statute can be applied retroactively. *See Warner* supra. However, §1-246 says that "When the penalty for an offense is prescribed by one law and altered by a subsequent law...the offender shall be punished under the law in force when the offense was committed." But even this maxim has an exception. If upon the reading of a statute, it appears that the intent was to have it apply retroactively, it will be given retroactive effect. (cont. on pg. 3) ☞

Support for retroactive application of Proposition 200 can be found in several different sections of the proposition. Take for example §41-1604.15 which addresses Parole Eligibility for Persons Previously Convicted of Personal Possession or Use of a Controlled Substance. After reading §41-1604.15, it is clear that Proposition 200 is applicable to persons already convicted and serving prison time for personal possession of controlled substances. Logically, Proposition 200 should also apply to defendants awaiting sentencing, otherwise, the strange situation develops where a defendant cannot take advantage of Proposition 200 at the time of sentencing, but can immediately obtain relief under Proposition 200 after being sentenced to prison.

Another strong argument for retroactive application can be found in the portions of the proposition dealing with "Findings and Declarations, Section 2 and Section 3, Purpose and Intent." Couple with those sections, the language in §13-901.01(A), which says "*Notwithstanding any law to the contrary*" and one gets the distinct impression that retroactivity was intended.

This leads us to another interesting issue which also suggests retroactive application. What happens to clients who can qualify under the provisions of §13-901.01 but who were put on probation for possession or use of controlled substances before the effective date of December 6, 1996? Can that probationer, if violated for something other than a term 1, be revoked and sent to prison or reinstated with additional jail time? Under Proposition 200, the answer may be *no further incarceration*! Under §13-901.01(E) upon a finding of a violation of probation, the defendant must be *reinstated* on probation. There may be stricter conditions of probation including home arrest but the sanctions must "*stop short of incarceration.*"

The state may argue that the language of §13-901.01(E) "a person who has been placed on probation under the provisions of this section," excludes probationers previously sentenced to probation. Once again, an analogy can be made to a recent State Supreme Court decision, *Zamora v. Reinstein*, 216 A.A.R. 23 (May 1996). In *Zamora*, the defendant claimed that the newly passed statute making felony DUIs allegeable forever, was not applicable to him. He argued that since his prior DUI conviction was not under the new statute with the new number, his prior was not allegeable. The court rejected this logic and said it was the nature of the offense which was important, not the section numbers. In the court's discussion of how to interpret the new statute they looked to the purpose of the legislation and what it was trying to accomplish. In *Zamora*, the court concluded that the legislature's intention at the time the bill was being considered was to expand the definition of historical priors. Therefore, it was illogical to conclude that a particular portion of the bill actually restricted the use of prior felonies. *See Zamora* at 24.

That same analysis may apply to Proposition 200. The whole purpose of Proposition 200 was to change the way first and second time drug offenders were treated by the courts. It focused on the use of incarceration as a sanction and restricted the court's ability to use it as a sentencing option. The reach of Proposition 200 even extended into the prisons, affecting defendants already convicted and serving time on simple possession of drug charges. Logically, if the Proposition applies retroactively to defendants who have already been sentenced, it must certainly apply to those defendants pending sentencing or awaiting trial.

Under §13-901.01(E), upon a finding of a violation of probation, the defendant must be *reinstated* on probation. There may be stricter conditions of probation, including home arrest, but the sanctions must "*stop short of incarceration.*"

What about a defendant currently on probation who meets the requirements of the new §13-901.01 and who has a deferred jail term left to serve as a condition of probation? Although it was a valid order at the time it was entered, in the interim the statute became effective and deprived the court of the power to order it. The legal basis for the order no longer exists. *See Wagner* at 1081.

Retroactivity and Incarceration

Interestingly enough, when talking about retroactivity, the analysis of Proposition 200 done by the legislative council in compliance with A.R.S. §19-124 seems to be a hybrid position. In paragraph 3 of the legislative analysis, it states that the new amendment would "require that persons who are *convicted* after the proposition passes of the personal possession or use of a controlled substance such as marijuana be eligible for probation."

A discussion of the legislative analysis brings up one last issue that needs to be touched on. That issue is whether or not defendants who are put on probation under the new §13-901.01(A) can be incarcerated as part of their probationary terms. Referring again to the legislative analysis in paragraph 3, it appears that "a person who is

(cont. on pg. 3) ☞

sentenced to probation does not serve any time in jail or prison, is under the supervision of a probation officer and remains free as long as the person continues his good behavior." The legislative council's opinion that incarceration is not available as a term of probation makes sense when considered in conjunction with §13-901.01(E) which mandates sanctions short of incarceration on probation violations.

Obviously, all the issues that are raised by Proposition 200 cannot be discussed in one article. Secondly, no one is quite sure how Proposition 200 will be interpreted. One thing that can be said with certainty is that Proposition 200 does apply to anyone who committed the crime of possession or use of a controlled substance or marijuana after the effective date of December 6, 1996. If you have a client who is about to be sentenced for personal use or possession and that client would qualify for probation under §13-901.01, ask the court to sentence him according to the new statute. If the court refuses, simply put on the record that your client is not waiving any rights he may be entitled to under Proposition 200. This should be enough to preserve the record and allow your client the ability to be resentenced if it is later determined that Proposition 200 was applicable to him. ■

OUT-OF-STATE FELONY CONVICTIONS

By Brian C. Bond
Attorney -- Group A

Even though your new client has prior felony convictions from out of state or prior federal convictions, all is not lost. Those priors may not be valid for enhancement on your client's brand new Arizona offense.

A.R.S. §13-604(N) states "foreign" convictions are valid for use under 604 if "the offense is punishable in Arizona as a felony....". Case law holds this means the underlying "foreign" conviction "must include all the elements necessary to constitute a felony offense in Arizona." *State v. Morrison*, 181 Ariz. 279, 888 P.2d 637 (App.1995); *State v. Clough*, 171 Ariz. 217, 829 P.2d 1263 (App.1992); *State v. Thompson*, 226 Ariz. Adv. Rep. 28 (Ct.App., filed 9/26/96).

The inquiry is driven by a comparison of the foreign jurisdiction's statute under which your client was convicted with the Arizona statutes. Collateral evidence, such as presentence reports, DOC reports, and other such extraneous documentation purporting to set forth what it is your client actually did to get himself convicted may not be considered in determining the validity of the prior. "Official versions" of your client's conduct, or unofficial ones for that matter, are basically meaningless. The only things that may be considered are the judgment itself and any documentation "effectively incorporated" into the judgment. See, *Thompson,* supra. To do otherwise would be to "go behind" the foreign judgment, which the Arizona courts have been loathe to allow, since you could wind up actually re-litigating the foreign crime--something that basically runs afoul of "full faith and credit" and more notably, a waste of court time. See, e.g., *State v. Gillies*, 135 Ariz. 500, 511, 662 P.2d 1007, 1018 (1983)(precluding the State from calling the victim of a prior crime to testify it had been committed with violence on the grounds the court would not "allow what is, in effect, a second trial on defendant's prior conviction..."). See, also, *State v. Schaaf,* 169 Ariz. 323, 819 P.2d 909 (1991), and *State v. Hinchey*, 165 Ariz. 432, 799 P.2d 352 (1990).

How, then, do you go about determining whether the "foreign" prior is valid? First, you have to figure out what specific crime your client was convicted of. You can usually get the title of the offense from the prosecutor's allegation of prior conviction. If you can get a look at the prior pack and find the out of state statute number, even better.

You then need to go to the County Law Library.[2] It has the statute books for all 50 states and the feds. There you need to find the statutes for the state of the conviction.

Now comes the entertaining part (to the extent something as dry as this could be called "entertaining"). If you can dream up some set of facts under which your client could be guilty under the foreign statute without "necessarily" having committed an Arizona felony, you have a bingo. Remember-- what your client apparently actually did does not matter. Why? Because what he "actually did" according to the minions of the foreign jurisdiction does not "necessarily" mean that is what the finder of fact actually determined. Whatever cops, probation officers, witnesses, your client, what have you, may have said or testified to, that may not be what the judge or jury hung their hat on in determining guilt. Hence, why all those extraneous documents may not be considered.

An example. In Washington, a person is guilty of burglary "if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building...". "Buildings" are defined in Washington to include cars, enclosed fences, big cardboard boxes, ...you get the picture. Arizona, however, requires an "intent to commit a felony or theft" to be guilty of burglary--"any crime" will not, then, "necessarily" do.[3] See, State v.Bergeron,711 P.2d 1000,

(cont. on pg. 5) ☞

10089 (Wash. 1985)(distinguishing "felony or theft" type statutes form "any crime" statutes). We're on our way--a Washington burglary is not, then, "necessarily" an Arizona burglary. So far, so good.

But the test does not require the out of state conviction translate to the Arizona statute closest to the same named crime--any Arizona felony will do. Criminal trespass, for instance. See, *Thompson,* supra. No Problem! Because, in order to be a felony criminal trespass in Arizona, it needs to be a residential structure or enclosed yard. A "building" in this Washington statue need not be a "residential" structure. Indeed, a three rail fenced corral will do. (In *State v. Gans*, 886 P.2d 578 (Wash. App.), the court upheld burglary convictions where some juveniles entered a corral at a petting zoo and mugged the donkey. The donkey's name was "Francis", by the way. The court determined Francis was "property" for purposes of a "crime against person or property." (Francis, unfortunately, didn't make it. Had he, he may have been miffed at the court's conclusion he was but a chattel--we'll never know.)

Okay, mugging a donkey might be a felony in Arizona--I didn't bother to try to look it up. Why? Don't need to. Because I thought of a scenario where I could commit "any crime" in a non-residential structure (thus avoiding the criminal trespass trap) without committing a theft or felony, and thus not committing an Arizona burglary.

Here it is--I enter a corral with the express intent of slapping Russ Born upside the head, but not hard enough to cause serious physical harm. Or, in fact, I do pop him one. I've committed a felony burglary in Washington. I've only committed misdemeanor assault in Arizona. The Washington prior is no good.

So, if your client has a lousy record, but had the good sense to commit his felonious indiscretions outside the great state of Arizona, you may be in luck. It's certainly worth a try.

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1. Make sure you find the right vintage version of the statute your client was convicted under. If it's more elderly than the County books cover, find Jim Likos or myself.

2. Do not rely on this for all Washington burgs. What's stated here is actually a shorthand version of Washington's "Burg, 2nd Degree", and is simply here for illustrative purposes. If you have a Washington burg, you'll still need to go look at the actual statutes.

■

Jury Instructions

WHEN YOUR *WINSHIP* IS TAKING ON WATER, IT'S ANY *PORTILLO* IN A STORM: DEFINING REASONABLE DOUBT -- THE SEQUEL

By James R. Rummage
Deputy Public Defender -- Appeals

As discussed in an article in the August, 1996, edition of *for The Defense*, the reasonable doubt instruction which the Arizona Supreme Court mandates in *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), has a number of serious shortcomings. (Defining Reasonable Doubt: Is *Winship* Sinking?, *for The Defense*, Vol. 6, Issue 8, August, 1996.) As pointed out in that article, the *Portillo* instruction lowers the burden of proof, shifts the burden of proof, misleads the jury on the concept of proof beyond a reasonable doubt, and generally undermines the concept of proof beyond a reasonable doubt. The article suggested that it would be appropriate to object to the *Portillo* instruction, recognizing that such an objection would likely be unsuccessful in state court.

After further consideration of the *Portillo* problem, and after some limited feedback about the August article, it appears there may be an alternative to simply objecting to the *Portillo* instruction. An objection to the *Portillo* instruction is sure to be overruled, since trial courts are directed in *Portillo* to give the instruction set out in that case. Once the objection is overruled, it would be wise to have another option to offer the trial court, which might soften the effect of the *Portillo* instruction.

With that in mind, this article sets out some suggested additions to the instruction mandated in *Portillo*. These additions to the *Portillo* instruction are designed to counteract the various problems presented by that instruction. The idea of adding to the *Portillo* instruction was inspired by the new Revised Arizona Jury Instruction (RAJI) on reasonable doubt.[1] As noted in the August article, the new RAJI on reasonable doubt does not eliminate or change any language in the *Portillo* instruction, but instead attempts to overcome the burden-shifting problem by adding a paragraph to the *Portillo* instruction. It is hoped that the other additions noted below will be somewhat successful in overcoming the other problems discussed in the August article. The language added to the *Portillo* instruction is set out in small capital letters in the following proposed instruction:

> The state has the burden of proving the defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary

(cont. on pg. 6) ☞

to prove that a fact is more likely true than not or that its truth is highly probable. THOSE TWO BURDENS OF PROOF USED IN CIVIL CASES ARE KNOWN AS PROOF BY "A PREPONDERANCE OF THE EVIDENCE" AND PROOF BY "CLEAR AND CONVINCING EVIDENCE," RESPECTIVELY.[2] In criminal cases such as this, the state's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. DO NOT CONFUSE THIS WITH THE LESSER BURDEN OF PROOF KNOWN AS PROOF BY CLEAR AND CONVINCING EVIDENCE, WHICH ONLY REQUIRES THAT THE TRUTH OF A FACT BE HIGHLY PROBABLE. There are very few things in this world which we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. THE LAW DOES, HOWEVER, REQUIRE THE STATE TO PRESENT PROOF THAT CONVINCES YOU OF THE DEFENDANT'S GUILT WITH UTMOST CERTAINTY.[3] ALTHOUGH THE LAW DOES NOT REQUIRE THE STATE TO PRESENT PROOF WHICH OVERCOMES EVERY DOUBT, IT DOES REQUIRE THE STATE TO PRESENT PROOF WHICH OVERCOMES EVERY REASONABLE DOUBT. If, based on your consideration of the evidence, you are firmly convinced, BEYOND EVERY REASONABLE DOUBT AND WITH UTMOST CERTAINTY [4], that the defendant is guilty of the crime charged, you must [5] find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty.

YOU MUST DECIDE WHETHER OR NOT THE STATE HAS PROVEN THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. YOU MUST START WITH THE PRESUMPTION THAT THE DEFENDANT IS INNOCENT. THE STATE MUST THEN PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. THIS MEANS THAT THE STATE MUST PROVE EACH ELEMENT OF THE CHARGE(S) BEYOND A REASONABLE DOUBT. IF YOU CONCLUDE THAT THE STATE HAS NOT MET ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT, THEN YOU MUST FIND THE DEFENDANT NOT GUILTY OF [THAT] [THOSE] CHARGE(S).[6]

The first two additions noted above are designed to counteract the use of the term "firmly convinced," which tends to lower the state's burden to proof by clear and convincing evidence. The next additional sentence is a response to the suggestion that the jury need not be convinced with "absolute certainty." Appellant is surely entitled to have the jury instructed, in answer to that suggestion, that the state must convince them with "utmost certainty," as the United States Supreme Court stated in *In re Winship*. Next, a sentence is added to balance the *Portillo* statement that, "in criminal cases the law does not require proof that overcomes every doubt." This statement in the *Portillo* instruction implies to the jury that so long as the state answers most of their doubts, they can convict. The sentence which is added makes clear that the state must overcome every *reasonable* doubt. The "utmost certainty" and "every reasonable doubt" language are then added again after the second mention of the term "firmly convinced," to counter the tendency of that term to reduce the state's burden to "clear and convincing" evidence. The RAJI paragraph added to the end of the instruction reduces the damage done by the language of the instruction which shifts the burden of proof. It is hoped that the all of the language added above will to some extent reduce the damage the *Portillo* instruction does to the concept of proof beyond a reasonable doubt. At the very least, it is hoped that the language added above will give defense counsel something worthwhile to argue to the jury on the topic of reasonable doubt.

There is certainly nothing sacred about the language proposed above. If you have a better idea, do not hesitate to use it. Be sure, however, no matter what you may propose to overcome the problems with the *Portillo* instruction, that you make a complete record at the instruction settlement conference as to why you are entitled to the language you are requesting. If you propose the language discussed above, it would be helpful to review the August article on *Portillo* in order to make the proper record. Should the trial court complain about adding material to the *Portillo* instruction, you may point out that the RAJI committee felt it was appropriate to add an entire paragraph to it.

It should be emphasized that the *Portillo* instruction is at its heart constitutionally deficient, and the language proposed above is merely designed to make the best of a very bad situation. When you need a lifeboat, and the only lifeboat available is full of big holes, you patch it up and hope it works. We all know that the best solution, however, is to simply replace the leaky lifeboat altogether. (cont. on pg. 7) ☞

1. As mentioned in August, the Arizona Supreme Court no longer gives qualified approval to any proposed instructions. The "R" in RAJI no longer means "Recommended," but rather means "Revised."

2. This point becomes more complicated in an insanity case, in which clear and convincing evidence is the defendant's burden with regard to the insanity defense.

3. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970).

4. *Ibid.*

5. Some have objected to the mandatory language -- that the jury must find the defendant guilty if the state has upheld its burden -- on the ground that it conflicts with the right to jury nullification. This proposed instruction does not address that concern.

6. This last paragraph is the paragraph which the RAJI adds to the *Portillo* instruction.

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THE COURTHOUSE EXPERIENCE

The Superior Court is seeking attorneys to participate in "The Courthouse Experience" program. The program is designed to give sixth through twelfth graders a positive, firsthand experience with lawyers and the court system. The program needs attorneys to volunteer to meet with the students.

Attorneys who choose to participate, meet with a class in the lobby of the Central Court Building and typically take students to observe a criminal morning calendar. After court, the attorney conducts a question and answer session to discuss what the students observed and explain basic principles of the legal system. No more than 25 students are assigned to an attorney.

. **To be listed as a participant, call Helen Cahill, Program Coordinator at 5810.** Ms. Cahill will then refer your name to a teacher. The teacher will directly contact you for arrangements. If you would like more details before signing up, you can contact our Training Administrator, Ellen Kirschbaum. She has a copy of the "Volunteer Attorney Resource Guild for The Courthouse Experience."

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PROFILES-WHO'S WHO IN THE PUBLIC DEFENDER'S OFFICE

By Ellen Kirschbaum
Training Administrator

Editor's Note: Let us know if you like the "Profiles" feature, we'll continue it each month.

Have you seen Arizona State University's College of Law brochure presenting their clinical education programs? If you have, you might recognize one of the faces. It's our own Victoria Washington. Victoria is a law clerk assigned to Group B. I was intrigued when I read that Victoria is a former police detective. This is a big switch... I decided to talk to this woman.

Victoria comes from a big family. She puts it as "huge." She is the youngest of thirteen brothers and sisters. It's also a family rooted in law enforcement. Both Victoria's mother and father were officers in St. Louis, Missouri. Her mother was the first black female officer in the state of Missouri and the first to teach at the FBI Academy. Later, her mother became an Administrative Law Judge in Missouri. Her father retired from state government working in immigration.

Victoria didn't originally grow up knowing she wanted to be an officer or attorney. In fact, Victoria obtained a B.A. in Religious Studies from the University of Missouri with dreams of joining the Peace Corp. Right after graduation though, family tradition set in and Victoria joined the Columbus, Missouri Police Department. A court experience with both the prosecutor and defense attorney made Victoria recognize she would have handled the case a lot differently. Thus, the idea to apply to law school! She took the LSAT, applied to law school and was accepted by Arizona State University. With no time to ponder this career change, Victoria left the security of "family" and headed to Arizona.

Law school turned out to be an alien world where she was the only "cop" and James Hamm, just released from the Department of Corrections, a classmate. I asked Victoria what she thought about Mr. Hamm's admittance to law school and her response was "everyone has their own dreams to pursue."

Law school became an evolution for Victoria. She's become more centered and although she can still think like a cop and occasionally misses the "street", she has a different perspective and more understanding. At first Victoria didn't know what direction in law she wanted

(cont. on pg. 8) ☞

to go, but her involvement with Practice and Moot Courts directed her focus to public defense.

When she's not thinking law, Victoria is a kid at heart. She calls herself a Star Trek fiend, a.k.a. "trekie." Needless to say, she was first in line for the recent release, "First Contact."

Victoria loves Arizona. She will be taking the Bar in February and eventually wants to make her dream reality. That is, to practice as a Public Defender. Good luck, Victoria!

BULLETIN BOARD

◆ *New Attorneys*

Jim Miller, former law clerk, has been promoted to attorney for Group C.

Vonda Wilkins has returned from Puerto Rico joining Group C as an attorney.

◆ *Support Staff*

Linda Ahlborn has joined our office as a Legal Secretary in Group C. Linda comes to us from the State of Arizona Department of Agriculture.

Also joining our staff as a Legal Secretary for Group D, is **Michelle Wood**. Michelle was previously employed by the Maricopa County Commute Options Program.

Gene Parker joins the IT Staff's Help Desk as a System Administrator II. Gene was formerly with the Maricopa County Attorney's Office.

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Editor: Russ Born

Assistant Editors: Jim Haas
Ellen Kirschbaum
Sherry Pape

Office: 11 West Jefferson, Suite 5
Phoenix, Arizona 85003
(602) 506-8200

for The Defense is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. ***for The Defense*** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

COMPUTER CORNER

By Susie Tapia
Help Desk - I.T.

Training Classes:

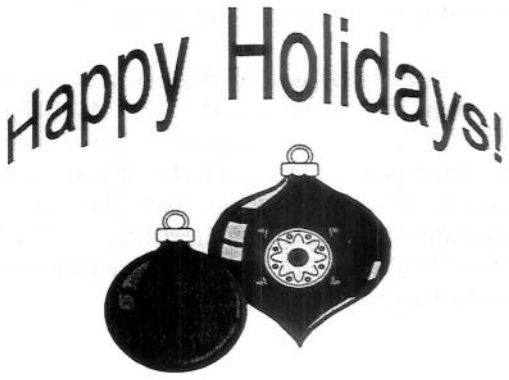
The December training calendar was posted and classes filled. The January calendar will be circulated the last week of December. Many classes for Windows, WordPerfect, Advanced WordPerfect & GroupWise will be available.

Mini seminars can be requested that are one hour in length and can cover tables, merge letters, table of authorities, GroupWise Proxy rights, etc. Please make all requests to the **Help Desk at 6198**. Each attendee of a training class will receive a purple computer manual containing all of the materials used in our training center. What a great reference book!

11:00p.m Cut off Time

Ever sit down at your pc in the morning only to experience strange error messages about some group files, or something called the PDSERV1 not responding? Well, each night at 11:00p.m. the tape backup kicks everyone off the system so it can completely backup all of your files. If you leave your computer on and files are open the tape backup cannot backup these files. To avoid these error messages close Windows before leaving for the evening. Choose Exit from the control menu and select Yes to exit Windows. Once you return to the red Novell Netware Box you are logged out of the system.

Happy Computing!



NOVEMBER, 1996
Jury & Bench Trials

Group A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Dang. "D"/ Priors/ On Prob./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
10/31- 11/6	Patricia Ramirez/ Yarbrough	Sheldon	Lawritson	CR96-04077 Felony Flight 2 cts. Aggravated DUI F5 F4	no yes yes	Guilty	Jury
11/4-19	Peg Green/ Jones	Mangum	Shutts	CR94-08249 Murder 2 F1		Guilty	Jury
11/7- 11/15	Dennis Farrell	Comm. Hicks	Clarke	CR96-07957 1 ct. Kidnapping 2 cts. Aggravated Assault F2 F3	yes no no	Not Guilty Kidnapping; 2 cts. Aggravated Assault -- Guilty of 1 count lesser-included Disorderly Conduct (Dangerous)	Jury
11/12- 11/18	Cary Lackey/ Yarbrough	Yarnell	Brnovich	CR96-00171 Burglary in the 3 F4	no yes yes	Guilty	Jury
11/21- 11/27	Robert Ellig / Jones	Mangum	Davis, Jay	CR95-11601 Felony Driving Under the Influence F4	no no no	Guilty	Jury
11/21- 11/27	James Likos	Comm. Chavez	Altman	CR96-05937 Attempted Murder 1 F2	yes yes no	Not Guilty -- Guilty of lesser-included Attempted Manslaughter with no priors	Jury

Group B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)/ Class F/M	Dang. "D"/ Priors/ On Prbtn./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench/ Jury Trial
10/28 to 11/13	Bud Duncn/ Ames	Dairman	Bernstein	CR96-03292 Agg. Asslt. F3	yes no no	Not Guilty	Jury
				Simple Assault; Disord. Conduct, Lesser Included; 2 Thefts		Guilty	Jury
				Burglary Stalking F3 F4		Hung 11 to 1	Jury
11/12 to 11/18	Larry Blieden/ Kasieta	McDougall	Wildermuth	CR95-11520 Burglary Armed Robbery Agg. Assault Kidnapping F2 F2 F2 F2	yes yes no	Guilty	Jury
11/19 to 11/21	John Taradash	Wilkinson	Cutler	CR95-08354 Agg. Asslt. F3	yes yes no	Guilty	Jury
10/24 to 11/6/96	Kevin Burns/ Corbett	Arellano	Kane	CR95-02036 Agg. Asslt.	yes no no	Hung Jury	Jury
11/25	Joel Brown/ Kasietts	Wilkinson	Garcia	CR95-03442 Murder; Child Abuse	yes yes no	Still in process	Jury

Group C

Dates: Start/Finish	Attorney/ Invsstigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Dang. "D"/ Priors/ On Prbtn./ Parole	Result (w/ hung jury, # of votesfor not guilty / guilty)	Bench / JuryTrial
10/31 to 10/31	Diana Squires	Araneta	Smyer	CR95-92884 Aggravated Assault F3	no no no	Guilty	Bench
11/4 to 11/14	Wes Peterson and Vernon Lorenz/ Clesceri	Armstrong	Cutler	CR96-90653 First Degree Murder F1	yes no no	Guilty of 2nd Degree Murder	Jury
11/7 to 11/7	Frank Sanchez L.T./ Thomas	Araneta	McKay	CR96-90087 Child Abuse F6	no no no	Guilty	Bench
11/20 to 11/21	Christine Israel/ T. Thomas	Hendrix	Cook	CR 96-91871 Misconduct Inv. Weapons Misconduct Inv. Weapons False Info to Police F4 M1 M1	no 2 no	Not Guilty Not Guilty Guilty	Jury
11/25 to 11/25	Christine Israel	Hendrix	Rueter	CR96-90862 PODD F4	no no no	Hung (6-2 in favor of not guilty)	Jury

Group D

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)/ Class F/M	Dang. "D"/ Priors/ On Prbtn./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
10-9 11-5	Robert Billar/ H. Jackson	Rogers	McCormick	CR-95-05618 1Ct. 1st Degree Murder/ F1	no yes parole	Guilty	Jury
10-28 10-31	Bob Jung	Mangum	Kramer	CR-96-06075 1Ct. Aggravated Assault/ F4		Guilty	Jury
10-28 10-31	Donna Elm MaryKay Grenier/ D. Erb	McDougall	Droban	CR-95-10006 1Ct. Aggravated Assault/ F3	yes yes no	Not Guilty	Jury
10-28 11-12	Jim Wilson/ M. Fusselman	Dunevant	Ditsworth	CR-95-07011(A) 1Ct. Murder 1st Degree/ F3	yes no no	Guilty	Jury
10-31 11-5	Jerald Schreck	Skiff	Mroz	CR-96-07798 1Ct. Selling Crack Cocaine/ F2	no 2 no	Guilty	Jury
10-31 11-5	Jeanne Steiner S. Bradley	Rogers	Brnovich	CR-96-02684 1Ct. Burglary/ F4	no yes parole	Hung Jury 5/Guilty 3/Not guilty	Jury
11- 1 11-18	Joe Stazzone	Dougherty	Tucker	CR-96-00533 1Ct. Kidnap 1Ct. Aggravated Assault 1Ct. Aggravated Assault/ F2, F3, F4	yes yes yes	Hung Jury 9/Guilty 3/Not Guilty	Jury
11-6	Richard Zielinski	McVay	J. Davis	TR-95-06083MI 1Ct. DUI/ M	no no no	Not Guilty	Jury
11-6 11-15	Jeanne Steiner	Chavez	Schlittner	CR-95-02640 3Cts. Narcotic Drug For Sale/ F4	no yes parole	Hung Jury 11/Guilty 1/Not Guilty	Jury
11-18 11-26	Tom Kibler/ S. Bradley	Lieberman (Por-Tem)	Warren Granville, A.G.	CR-96-06165 1Ct. Theft/ F3	no no yes (but not alleging)	Not Guilty	Jury
11-20 12-3	Curtis Backman Jeremy Mussman/ D. Erb	Doughtery	Shutts	CR-93-09611 1Ct. Aggravated Assault/ F3	yes no no	Not Guilty	Jury

Office of the Legal Defender

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)/ Class F/M	Dang. "D"/ Priors/ On Prbtn./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench/ Jury Trial
11/25- 11/25	L.Tate	McDougall	M.Brnovich	CR96-01815 POMS F4	no no no	Dismissed on day of trial after defense motion in limine	Jury
11/13- 11/14	D.Patton	Sheldon	J.Fleenor	CR95-07346 Ct.1:Trafficking in Stolen Property Ct.2:Theft F3 F3	no no no	Ct.1:Guilty Ct.2:Not Guilty	Jury
11/18- 11/22	S.Allen/ E. Soto	Scott	R.Harris	CR96-92806 Ct.1:Kidnapping Ct.2:False Imprisonment Ct.3:False Imprisonment C4F C1M C1M	no no no	Not Guilty on all counts	Jury
11/14- 11/21	C.Funcke/ K. Brandenber ger	Arellano	D.Schumacher	CR95-11327 Ct.1:Armed Robbery F2	yes no no	Hung Jury	Jury
10/31- 12/5	R.Miller/ B. Abernath	D'Angelo	L.Ruiz	CR95-06333 Ct.1:Murder Ct.2:Murder Ct.3:Agg.Assault Ct.4:Agg.Assault F1 F1 F3 F3	yes no no	Ct.3:Dismissed Cts.1,2,4:Hung Jury	Jury

PROPOSITION 200

OFFICIAL TITLE

AN INITIATIVE MEASURE

AMENDING TITLE 13, TITLE 41, AND TITLE 42, OF THE ARIZONA REVISED STATUTES; AMENDING TITLE 41, CHAPTER 11, BY ADDING §41-1604.16; RELATING TO ESTABLISHMENT OF THE ARIZONA PARENTS COMMISSION ON DRUG EDUCATION AND PREVENTION; AMENDING TITLE 41, CHAPTER 11, BY ADDING §41-1604.14; RELATING TO PERSONS NOT ELIGIBLE FOR PAROLE; AMENDING TITLE 13, CHAPTER 13, BY AMENDING §13-3412 AND ADDING §13-3412.01; RELATING TO PERMISSIBLE USE OF CONTROLLED SUBSTANCES BY SERIOUSLY ILL OR TERMINALLY ILL PATIENTS; AMENDING TITLE 41, CHAPTER 11, BY ADDING §41-1604.15 AND AMENDING TITLE 31, CHAPTER 3, BY ADDING §31-411.01; RELATING TO PAROLE FOR PERSONS CONVICTED OF PERSONAL POSSESSION OR USE OF CONTROLLED SUBSTANCES; AMENDING TITLE 13, CHAPTER 9, BY ADDING §13-901.01; RELATING TO PROBATION FOR PERSONS CONVICTED OF PERSONAL POSSESSION OR USE OF CONTROLLED SUBSTANCES AND BY ADDING §13-901.02; RELATING TO THE ESTABLISHMENT OF THE DRUG TREATMENT AND EDUCATION FUND; AND AMENDING TITLE 42, CHAPTER 12, BY ADDING §42-1204.01; RELATING TO LUXURY PRIVILEGE TAXES; AND PROVIDING FOR SEVERABILITY.

TEXT OF PROPOSED AMENDMENT

Be it enacted by the people of the State of Arizona:

The following amendments are proposed to become valid when approved by a majority of the qualified electors voting thereon and upon proclamation pursuant thereto by the Governor of the State of Arizona.

Section 1. TITLE

THIS ACT SHALL BE KNOWN AND MAY BE CITED AS THE "DRUG MEDICALIZATION, PREVENTION, AND CONTROL ACT OF 1996."

Section 2. FINDINGS AND DECLARATIONS

THE PEOPLE OF THE STATE OF ARIZONA FIND AND DECLARE THE FOLLOWING:

(A) ARIZONA'S CURRENT APPROACH TO DRUG CONTROL NEEDS TO BE STRENGTHENED. THIS IS EVIDENCED BY THE FACT THAT, ACCORDING TO THE ARIZONA CRIMINAL JUSTICE COMMISSION, BETWEEN 1991 AND 1993 MARIJUANA USE DOUBLED AMONG ELEMENTARY SCHOOL STUDENTS AND, BETWEEN 1990 AND 1993 QUADRUPLED AMONG MIDDLE-SCHOOL STUDENTS. IN ADDITION TO ACTIVELY ENFORCING OUR CRIMINAL LAWS AGAINST DRUGS, WE NEED TO MEDICALIZE ARIZONA'S DRUG CONTROL POLICY: RECOGNIZING THAT DRUG ABUSE IS A PUBLIC HEALTH PROBLEM AND TREATING ABUSE AS A DISEASE. THUS, DRUG TREATMENT AND PREVENTION MUST BE EXPANDED.

(B) WE MUST ALSO TOUGHEN ARIZONA'S LAWS AGAINST VIOLENT CRIMINALS ON DRUGS. ANY PERSON WHO COMMITS A VIOLENT CRIME WHILE UNDER THE INFLUENCE OF ILLEGAL DRUGS SHOULD SERVE 100% OF HIS OR HER SENTENCE WITH ABSOLUTELY NO EARLY RELEASE.

(C) THOUSANDS OF ARIZONANS SUFFER FROM DEBILITATING DISEASES SUCH AS GLAUCOMA, MULTIPLE SCLEROSIS, CANCER, AND AIDS, BUT CANNOT HAVE ACCESS TO THE NECESSARY DRUGS THEY NEED. ALLOWING DOCTORS TO PRESCRIBE SCHEDULE I CONTROLLED SUBSTANCES COULD SAVE VICTIMS OF THESE DISEASES FROM LOSS OF SIGHT, LOSS OF PHYSICAL CAPACITY, AND GREATLY REDUCE THE PAIN AND SUFFERING OF THE SERIOUSLY ILL AND TERMINALLY ILL.

(D) THE DRUG PROBLEMS OF NON-VIOLENT PERSONS WHO ARE CONVICTED OF PERSONAL POSSESSION OR USE OF DRUGS ARE BEST HANDLED THROUGH COURT-SUPERVISED DRUG TREATMENT AND EDUCATION PROGRAMS. THESE PROGRAMS ARE MORE EFFECTIVE THAN LOCKING NON-VIOLENT OFFENDERS UP IN A COSTLY PRISON. PILOT PROGRAMS IN ARIZONA THAT PROVIDE TREATMENT ALTERNATIVES TO PRISON FOR LOW LEVEL DRUG OFFENDERS HAVE A 73% SUCCESS RATE AND COST ROUGHLY 1/8 AS MUCH AS PRISON. OVER THE NEXT DECADE HUNDREDS OF MILLIONS OF DOLLARS CAN BE SAVED BY USING MANDATORY DRUG TREATMENT AND EDUCATION PROGRAMS AS AN ALTERNATIVE TO PRISON.

(E) VIOLENT OFFENDERS ARE NOT ADEQUATELY PUNISHED DUE TO THE PRISON OVER-CROWDING CRISIS IN ARIZONA. PLACING NON-VIOLENT PERSONS WHO ARE CONVICTED OF PERSONAL POSSESSION OR USE OF DRUGS IN COURT-SUPERVISED DRUG TREATMENT AND EDUCATION PROGRAMS WILL FREE UP SPACE IN OUR PRISONS SO THAT THERE IS ROOM TO INCARCERATE VIOLENT OFFENDERS AND DRUG DEALERS.

(F) THE MISSING LINK IN DRUG EDUCATION AND PREVENTION IS PARENTAL INVOLVEMENT. THE TAX DOLLARS SAVED BY ELIMINATING PRISON TIME FOR NON-VIOLENT PERSONS CONVICTED OF PERSONAL POSSESSION OR USE OF DRUGS SHOULD BE USED FOR DRUG TREATMENT AND EDUCATION, TARGETED AT PROGRAMS THAT INCREASE PARENTAL INVOLVEMENT IN THEIR CHILDREN'S DRUG-EDUCATION.

Section 3. PURPOSE AND INTENT

THE PEOPLE OF THE STATE OF ARIZONA DECLARE THEIR PURPOSES TO BE AS FOLLOWS:

(A) TO REQUIRE THAT ANY PERSON WHO COMMITS A VIOLENT CRIME UNDER THE INFLUENCE OF DRUGS SERVE 100 PERCENT OF HIS OR HER SENTENCE AND NOT BE ELIGIBLE FOR PAROLE OR ANY FORM OF EARLY RELEASE.

(B) TO PERMIT DOCTORS TO PRESCRIBE SCHEDULE I CONTROLLED SUBSTANCES TO TREAT A DISEASE, OR TO RELIEVE THE PAIN AND SUFFERING OF SERIOUSLY ILL AND TERMINALLY ILL PATIENTS.

(C) TO REQUIRE THAT NON-VIOLENT PERSONS CONVICTED OF PERSONAL POSSESSION OR USE OF DRUGS SUCCESSFULLY UNDERGO COURT-SUPERVISED MANDATORY DRUG TREATMENT PROGRAMS AND PROBATION.

(D) TO REQUIRE THAT NON-VIOLENT PERSONS CURRENTLY IN PRISON FOR PERSONAL POSSESSION OR USE OF ILLEGAL DRUGS, AND NOT SERVING A CONCURRENT SENTENCE FOR ANOTHER CRIME, OR PREVIOUSLY CONVICTED OR SENTENCED OR SUBJECT TO SENTENCING UNDER ANY HABITUAL CRIMINAL STATUTE IN ANY JURISDICTION IN THE UNITED STATES, BE MADE ELIGIBLE FOR IMMEDIATE PAROLE AND DRUG TREATMENT, EDUCATION AND COMMUNITY SERVICE.

(E) TO FREE UP SPACE IN OUR PRISONS TO PROVIDE ROOM FOR VIOLENT OFFENDERS.

(F) TO EXPAND THE SUCCESS OF PILOT DRUG INTERVENTION PROGRAMS WHICH DIVERT DRUG OFFENDERS FROM PRISON TO DRUG TREATMENT, EDUCATION, AND COUNSELING.

Section 4.

Title 41, Chapter 11, Arizona Revised Statutes, is amended by adding §41-1604.16 to read as follows:

§41-1604.16. ARIZONA PARENTS COMMISSION ON DRUG EDUCATION AND PREVENTION.

A. THE ARIZONA PARENTS COMMISSION ON DRUG EDUCATION AND PREVENTION IS HEREBY CREATED. THE COMMISSION SHALL CONSIST OF NINE (9) MEMBERS. THE MEMBERS OF THE COMMISSION SHALL BE APPOINTED BY THE GOVERNOR WITHIN SIXTY (60) DAYS OF THE EFFECTIVE DATE OF THIS ACT AND SHALL SERVE A TWO YEAR TERM. OF THE NINE MEMBERS, FIVE SHALL BE PARENTS WITH CHILDREN CURRENTLY ENROLLED IN AN ARIZONA SCHOOL, ONE SHALL BE A REPRESENTATIVE OF A LAW ENFORCEMENT AGENCY, ONE SHALL BE AN EDUCATOR IN A LOCAL SCHOOL DISTRICT, ONE SHALL BE A REPRESENTATIVE OF A COUNTY PROBATION DEPARTMENT, AND ONE SHALL BE A REPRESENTATIVE OF THE DRUG EDUCATION AND

TREATMENT COMMUNITY.

B. EACH MEMBER SHALL BE APPOINTED FOR A TERM OF TWO YEARS. THE MEMBERS SHALL RECEIVE NO PAY, BUT MAY BE REIMBURSED FOR ACTUAL EXPENSES INCURRED ON COMMISSION BUSINESS.

C. THE COMMISSION SHALL FUND PROGRAMS THAT WILL INCREASE AND ENHANCE PARENTAL INVOLVEMENT AND WILL INCREASE EDUCATION ABOUT THE SERIOUS RISKS AND PUBLIC HEALTH PROBLEMS CAUSED BY THE ABUSE OF ALCOHOL AND CONTROLLED SUBSTANCES.

D. THE COMMISSION SHALL CONTRACT FOR ADMINISTRATIVE AND PROFESSIONAL SERVICES WITH A NOT FOR PROFIT ORGANIZATION OR GOVERNMENT ENTITY WITH EXPERTISE IN SUBSTANCE ABUSE EDUCATION AND PREVENTION.

Section 5.

Title 41, Chapter 11, Arizona Revised Statutes, is amended by adding §41-1604.14 to read as follows:

§41-1604.14. PAROLE NONELIGIBILITY; VIOLENT CRIME; INFLUENCE OF CONTROLLED SUBSTANCE; DEFINITION

A. NOTWITHSTANDING ANY LAW TO THE CONTRARY, ANY PERSON CONVICTED OF A VIOLENT CRIME COMMITTED WHILE UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE IN VIOLATION OF THE PROVISIONS TITLE 13, CHAPTER 34, IS NONELIGIBLE FOR PAROLE AND MUST SERVE 100 PERCENT OF HIS OR HER SENTENCE IN PRISON. PURSUANT TO §41-1604.09, THE DIRECTOR SHALL INCLUDE ANY SUCH PERSON IN THE CLASSES OF NON-ELIGIBILITY REQUIRED TO BE ESTABLISHED BY THE DIRECTOR.

B. FOR THE PURPOSE OF THIS SECTION, A VIOLENT CRIME INCLUDES ANY CRIMINAL ACT WHICH RESULTS IN DEATH OR PHYSICAL INJURY OR ANY CRIMINAL USE OF WEAPONS OR DANGEROUS INSTRUMENTS.

Section 6.

Title 13, Chapter 13, §13-3412, Arizona Revised Statutes, is amended as follows:

§13-3412. Exceptions and exemptions; burden of proof; privileged communications.

A. The provisions of §§13-3402, 13-3403, 13-3404, 13-3404.01 and 13-3405 through 13-3409 do not apply to:

1. Manufacturers, wholesalers, pharmacies and pharmacists under the provisions of §32-1921 and 32-1961.
2. Medical practitioners, pharmacies and pharmacists while acting in the course of their professional practice, in good faith and in accordance with generally accepted medical standards.
3. Persons who lawfully acquire and use such drugs only for scientific purposes.
4. Officers and employees of the United States, this state or a political subdivision of the United States or this state, while acting in the course of their official duties.

5. An employee or agent of a person described in paragraphs 1 through 4 of this subsection, and a registered nurse or medical technician under the supervision of a medical practitioner, while such employee, agent, nurse or technician is acting in the course of professional practice or employment, and not on his own account.
6. A common or contract carrier or warehouseman, or an employee of such carrier or warehouseman, whose possession of such drugs is in the usual course of business or employment.
7. Persons lawfully in possession or control of controlled substances authorized by title 36, chapter 27.
8. Persons who sell any non-narcotic substance that under the federal food, drug and cosmetic act may lawfully be sold over the counter without a prescription.
9. THE RECEIPT, POSSESSION OR USE, OF A CONTROLLED SUBSTANCE INCLUDED IN SCHEDULE I OF §36-2512, BY ANY SERIOUSLY ILL OR TERMINALLY ILL PATIENT, PURSUANT TO THE PRESCRIPTION OF A DOCTOR IN COMPLIANCE WITH THE PROVISIONS OF §13-3412.01.

B. In any complaint, information or indictment and in any action or proceeding brought for the enforcement of any provision of this chapter the burden of proof of any such exception, excuse, defense or exemption is on the defendant.

C. In addition to other exceptions to the physician-patient privilege, information communicated to a physician in an effort to procure unlawfully a prescription-only, dangerous or narcotic drug, or to procure unlawfully the administration of such drug, is not a privileged communication.

Section7.

Title 13, Chapter 13, Arizona Revised Statutes, is amended by adding §13-3412.01 to read as follows:

§13-3412.01. PRESCRIBING CONTROLLED SUBSTANCES INCLUDED IN SCHEDULE I OF §36-2512 FOR SERIOUSLY ILL AND TERMINALLY ILL PATIENTS

A. NOTWITHSTANDING ANY LAW TO THE CONTRARY, ANY MEDICAL DOCTOR LICENSED TO PRACTICE IN ARIZONA MAY PRESCRIBE A CONTROLLED SUBSTANCE INCLUDED IN SCHEDULE I OF §36-2512 TO TREAT A DISEASE, OR TO RELIEVE THE PAIN AND SUFFERING OF A SERIOUSLY ILL PATIENT OR TERMINALLY ILL PATIENT, SUBJECT TO THE PROVISIONS OF §13-3412.01. IN PRESCRIBING SUCH A CONTROLLED SUBSTANCE, THE MEDICAL DOCTOR SHALL COMPLY WITH PROFESSIONAL MEDICAL STANDARDS.

B. NOTWITHSTANDING ANY LAW TO THE CONTRARY, A MEDICAL DOCTOR MUST DOCUMENT THAT SCIENTIFIC RESEARCH EXISTS WHICH SUPPORTS THE USE OF A CONTROLLED SUBSTANCE LISTED IN SCHEDULE I OF §36-2512 TO TREAT A DISEASE, OR TO RELIEVE THE PAIN AND

SUFFERING OF A SERIOUSLY ILL PATIENT OR TERMINALLY ILL PATIENT BEFORE PRESCRIBING THE CONTROLLED SUBSTANCE. A MEDICAL DOCTOR PRESCRIBING A CONTROLLED SUBSTANCE INCLUDED IN SCHEDULE I OF §36-2512 TO TREAT A DISEASE, OR TO RELIEVE THE PAIN AND SUFFERING OF A SERIOUSLY ILL PATIENT OR TERMINALLY ILL PATIENT, MUST OBTAIN THE WRITTEN OPINION OF A SECOND MEDICAL DOCTOR THAT THE PRESCRIBING OF THE CONTROLLED SUBSTANCE IS APPROPRIATE TO TREAT A DISEASE OR TO RELIEVE THE PAIN AND SUFFERING OF A SERIOUSLY ILL PATIENT OR TERMINALLY ILL PATIENT. THE WRITTEN OPINION OF THE SECOND MEDICAL DOCTOR SHALL BE KEPT IN THE PATIENT'S OFFICIAL MEDICAL FILE. BEFORE PRESCRIBING THE CONTROLLED SUBSTANCE INCLUDED IN SCHEDULE I OF §36-2512 THE MEDICAL DOCTOR SHALL RECEIVE IN WRITING THE CONSENT OF THE PATIENT.

C. ANY FAILURE TO COMPLY WTH THE PROVISIONS OF THIS SECTION MAY BE THE SUBJECT OF INVESTIGATION AND APPROPRIATE DISCIPLINING ACTION BY THE BOARD OF MEDICAL EXAMINERS.

Section 8.

Title 41, Chapter 11, Arizona Revised Statutes, is amended by adding §41-1604.15 to read as follows:

§41-1604.15. PAROLE ELIGIBILITY FOR PERSONS PREVIOUSLY CONVICTED OF PERSONAL POSSESSION OR USE OF A CONTROLLED SUBSTANCE

A. NOTWITHSTANDING ANY LAW TO THE CONTRARY, IF A PRISONER HAS BEEN CONVICTED OF THE PERSONAL POSSESSION OR USE OF A CONTROLLED SUBSTANCE AS DEFINED IN §36-2501, AND IS NOT CONCURRENTLY SERVING ANOTHER SENTENCE, THE PRISONER SHALL BE ELIGIBLE FOR PAROLE.

B. ANY PERSON WHO HAS PREVIOUSLY BEEN CONVICTED OF A VIOLENT CRIME AS DEFINED IN §41-1604.14, SUBSECTION B OR HAS PREVIOUSLY BEEN CONVICTED, SENTENCED OR SUBJECT TO SENTENCING UNDER ANY HABITUAL CRIMINAL STATUTE IN ANY JURISDICTION IN THE UNITED STATES, SHALL NOT BE ELIGIBLE FOR PAROLE PURSUANT TO THE PROVISIONS OF THIS SECTION.

C. PERSONAL POSSESSION OR USE OF A CONTROLLED SUBSTANCE PURSUANT TO THIS ACT SHALL NOT INCLUDE POSSESSION FOR SALE, PRODUCTION, MANUFACTURING, OR TRANSPORTATION FOR SALE OF ANY CONTROLLED SUBSTANCE.

D. WITHIN NINETY (90) DAYS OF THE EFFECTIVE DATE OF THIS ACT, THE DIRECTOR OF THE STATE DEPARTMENT OF CORRECTIONS SHALL PREPARE A LIST WHICH IDENTIFIES EACH PERSON WHO IS ELIGIBLE FOR PAROLE PURSUANT

TO THE PROVISIONS OF THIS SECTION, AND DELIVER THE LIST TO THE BOARD OF EXECUTIVE CLEMENCY.

Section 9.

Title 31, Chapter 3, Arizona Revised Statutes, is amended by adding §31-411.01 to read as follows:

§31-411.01. PAROLE FOR PERSONS PREVIOUSLY CONVICTED OF PERSONAL POSSESSION OR USE OF A CONTROLLED SUBSTANCE; TREATMENT; PREVENTION; EDUCATION; TERMINATION OF PAROLE

A. NOTWITHSTANDING ANY LAW TO THE CONTRARY, EVERY PRISONER WHO IS ELIGIBLE FOR PAROLE PURSUANT TO THE PROVISIONS OF §41-1604.15 SHALL BE RELEASED UPON PAROLE, PROVIDED, HOWEVER THAT IF THE BOARD OF EXECUTIVE CLEMENCY DETERMINES THAT A PRISONER SO ELIGIBLE WOULD BE A DANGER TO THE GENERAL PUBLIC, THAT PRISONER SHALL NOT BE RELEASED UPON PAROLE.

B. AS TO EACH PRISONER RELEASED UPON PAROLE PURSUANT TO THE PROVISIONS OF THIS SECTION, THE BOARD SHALL ORDER THAT AS A CONDITION OF PAROLE THE PERSON BE REQUIRED TO PARTICIPATE IN AN APPROPRIATE DRUG TREATMENT OR EDUCATION PROGRAM ADMINISTERED BY A QUALIFIED AGENCY OR ORGANIZATION THAT PROVIDES SUCH TREATMENTS TO PERSONS WHO ABUSE CONTROLLED SUBSTANCES. EACH PERSON ENROLLED IN A DRUG TREATMENT OR EDUCATION PROGRAM SHALL BE REQUIRED TO PAY FOR HIS OR HER PARTICIPATION IN THE PROGRAM TO THE EXTENT OF HIS OR HER FINANCIAL ABILITY.

C. EACH PERSON RELEASED UPON PAROLE PURSUANT TO THE PROVISIONS OF THIS SECTION SHALL REMAIN ON PAROLE UNLESS THE BOARD REVOKES PAROLE OR GRANTS AN ABSOLUTE DISCHARGE FROM PAROLE OR UNTIL THE PRISONER REACHES HIS OR HER INDIVIDUAL EARNED RELEASE CREDIT DATE PURSUANT TO §41-1604.10. WHEN THE PRISONER REACHES HIS OR HER INDIVIDUAL EARNED RELEASE CREDIT DATE, HIS OR HER PAROLE SHALL BE TERMINATED AND HE OR SHE SHALL NO LONGER BE UNDER THE AUTHORITY OF THE BOARD.

Section 10:

Title 13, Chapter 9, Arizona Revised Statutes, is amended by adding §13-901.01 to read as follows:

§13-901.01. PROBATION FOR PERSONS CONVICTED OF PERSONAL POSSESSION AND USE OF CONTROLLED SUBSTANCES; TREATMENT; PREVENTION; EDUCATION

A. NOTWITHSTANDING ANY LAW TO THE CONTRARY, ANY PERSON WHO IS CONVICTED OF THE PERSONAL POSSESSION OR USE OF A CONTROLLED SUBSTANCE AS DEFINED IN §36-2501 SHALL BE ELIGIBLE FOR PROBATION. THE COURT SHALL SUSPEND THE IMPOSITION OR

EXECUTION OF SENTENCE AND PLACE SUCH PERSON ON PROBATION.

B. ANY PERSON WHO HAS BEEN CONVICTED OF OR INDICTED FOR A VIOLENT CRIME AS DEFINED §41-1604.14, SUBSECTION B SHALL NOT BE ELIGIBLE FOR PROBATION AS PROVIDED FOR IN THIS SECTION, BUT INSTEAD SHALL BE SENTENCED PURSUANT TO THE OTHER PROVISIONS OF TITLE 13, CHAPTER 34.

C. PERSONAL POSSESSION OR USE OF A CONTROLLED SUBSTANCE PURSUANT TO THIS ACT SHALL NOT INCLUDE POSSESSION FOR SALE, PRODUCTION, MANUFACTURING, OR TRANSPORTATION FOR SALE OF ANY CONTROLLED SUBSTANCE.

D. IF A PERSON IS CONVICTED OF PERSONAL POSSESSION OR USE OF A CONTROLLED SUBSTANCE AS DEFINED IN §36-2501, AS A CONDITION OF PROBATION, THE COURT SHALL REQUIRE PARTICIPATION IN AN APPROPRIATE DRUG TREATMENT OR EDUCATION PROGRAM ADMINISTERED BY A QUALIFIED AGENCY OR ORGANIZATION THAT PROVIDES SUCH PROGRAMS TO PERSONS WHO ABUSE CONTROLLED SUBSTANCES. EACH PERSON ENROLLED IN A DRUG TREATMENT OR EDUCATION PROGRAM SHALL BE REQUIRED TO PAY FOR HIS OR HER PARTICIPATION IN THE PROGRAM TO THE EXTENT OF HIS OR HER FINANCIAL ABILITY.

E. A PERSON WHO HAS BEEN PLACED ON PROBATION UNDER THE PROVISIONS OF THIS SECTION, WHO IS DETERMINED BY THE COURT TO BE IN VIOLATION OF HIS OR HER PROBATION SHALL HAVE NEW CONDITIONS OF PROBATION ESTABLISHED IN THE FOLLOWING MANNER: THE COURT SHALL SELECT THE ADDITIONAL CONDITIONS IT DEEMS NECESSARY, INCLUDING INTENSIFIED DRUG TREATMENT, COMMUNITY SERVICE, INTENSIVE PROBATION, HOME ARREST, OR ANY OTHER SUCH SANCTIONS SHORT OF INCARCERATION.

F. IF PERSON IS CONVICTED A SECOND TIME OF PERSONAL POSSESSION OR USE OF A CONTROLLED SUBSTANCE AS DEFINED IN §36-2501, THE COURT MAY INCLUDE ADDITIONAL CONDITIONS OF PROBATION IT DEEMS NECESSARY, INCLUDING INTENSIFIED DRUG TREATMENT, COMMUNITY SERVICE, INTENSIVE PROBATION, HOME ARREST, OR ANY OTHER ACTION WITHIN THE JURISDICTION OF THE COURT.

G. A PERSON WHO HAS BEEN CONVICTED THREE TIMES OF PERSONAL POSSESSION OR USE OF A CONTROLLED SUBSTANCE AS DEFINED IN §36-2501 SHALL NOT BE ELIGIBLE FOR PROBATION UNDER THE PROVISIONS OF THIS SECTION, BUT INSTEAD SHALL BE SENTENCED PURSUANT TO THE OTHER PROVISIONS OF TITLE 13, CHAPTER 34.

Section 11.

Title 13, Chapter 9, Arizona Revised Statutes, is amended by adding §13-901.02 to read as follows:

§13-901.02. DRUG TREATMENT AND EDUCATION FUND

A. THERE IS HEREBY CREATED A SPECIAL FUND WHICH SHALL BE CALLED THE DRUG TREATMENT AND EDUCATION FUND IN THE ADMINISTRATIVE OFFICE OF SUPREME COURT.

B. FIFTY (50) PERCENT OF THE MONIES DEPOSITED IN THE DRUG TREATMENT AND EDUCATION FUND SHALL BE DISTRIBUTED BY THE ADMINISTRATIVE OFFICE OF THE SUPREME COURT TO THE SUPERIOR COURT PROBATION DEPARTMENTS TO COVER THE COSTS OF PLACING PERSONS IN DRUG EDUCATION AND TREATMENT PROGRAMS ADMINISTERED BY A QUALIFIED AGENCY OR ORGANIZATION THAT PROVIDES SUCH PROGRAMS TO PERSONS WHO ABUSE CONTROLLED SUBSTANCES. SUCH MONIES SHALL BE ALLOCATED TO SUPERIOR COURT PROBATION DEPARTMENTS ACCORDING TO A FORMULA BASED ON PROBATION CASELOAD TO BE ESTABLISHED BY THE ADMINISTRATIVE OFFICE OF THE SUPREME COURT.

C. FIFTY (50) PERCENT OF THE MONIES DEPOSITED IN THE DRUG TREATMENT AND EDUCATION FUND SHALL BE TRANSFERRED TO THE ARIZONA PARENTS COMMISSION ON DRUG EDUCATION AND PREVENTION ESTABLISHED PURSUANT TO §41-1604.16.

D. THE ADMINISTRATIVE OFFICE OF THE SUPREME COURT SHALL CAUSE TO BE PREPARED AT THE END OF EACH FISCAL YEAR AFTER 1997 AN ACCOUNTABILITY REPORT CARD THAT DETAILS THE COST SAVINGS REALIZED FROM THE DIVERSION OF PERSONS FROM PRISONS TO PROBATION. A COPY OF THE REPORT SHALL BE SUBMITTED TO THE GOVERNOR AND THE LEGISLATURE, AND A COPY OF THE REPORT SHALL BE SENT TO EACH PUBLIC LIBRARY IN THE STATE. THE ADMINISTRATIVE OFFICE OF THE SUPREME COURT SHALL RECEIVE REIMBURSEMENT FROM THE DRUG TREATMENT AND EDUCATION FUND FOR ANY ADMINISTRATIVE COSTS IT INCURS IN THE IMPLEMENTATION OF THIS ACT.

Section 12.

Title 42, Chapter 12 is amended by adding §42-1204.01 as follows:

§42-1204.01. LUXURY PRIVILEGES TAX; PURPOSE; DRUG TREATMENT AND EDUCATION FUND; DEPARTMENT OF CORRECTIONS REVOLVING FUND

A. NOTWITHSTANDING ANY LAW TO THE CONTRARY, SEVEN (7) PERCENT OF THE MONIES COLLECTED BETWEEN JANUARY 1, 1997 AND DECEMBER 31, 1999, PURSUANT TO §42-1204 SUBSECTION A, PARAGRAPH 1, AND EIGHTEEN (18) PERCENT OF MONIES COLLECTED BETWEEN JANUARY 1, 1997 AND DECEMBER 31, 1999, PURSUANT TO SUBSECTION

A, PARAGRAPHS 2, 3, AND 4, SHALL BE DEPOSITED IN THE DRUG TREATMENT AND EDUCATION FUND ESTABLISHED PURSUANT TO §13-902.02.

B. NOTWITHSTANDING ANY LAW TO THE CONTRARY, THREE (3) PERCENT OF THE MONIES COLLECTED BETWEEN JANUARY 1, 1997 AND DECEMBER 31, 1999, PURSUANT TO SECTION §42-1204 SUBSECTION A, PARAGRAPH 1, AND SEVEN (7) PERCENT OF MONIES COLLECTED BETWEEN JANUARY 1, 1997 AND DECEMBER 31, 1999, PURSUANT TO SUBSECTION A, PARAGRAPHS 2, 3, AND 4, SHALL BE DEPOSITED IN A SEPARATE REVOLVING FUND OF THE DEPARTMENT OF CORRECTIONS FOR PAYMENT OF THE EXPENSES OF IMPLEMENTING THE PROVISIONS OF §31-411.01, AND SHALL NOT REVERT TO THE STATE GENERAL FUND IF UNEXPENDED AT THE CLOSE OF THE FISCAL YEAR.

C. NOTWITHSTANDING ANY LAW TO THE CONTRARY, TEN (10) PERCENT OF THE MONIES COLLECTED AFTER DECEMBER 31, 1999 PURSUANT TO §42-1204 SUBSECTION A, PARAGRAPH 1, AND TWENTY FIVE (25) PERCENT OF THE MONIES COLLECTED AFTER DECEMBER 31, 1999 PURSUANT TO SUBSECTION A, PARAGRAPHS 2, 3, AND 4, SHALL BE DEPOSITED IN THE DRUG TREATMENT AND EDUCATION FUND ESTABLISHED PURSUANT TO §13-902.02.

Section 13. Severability

If any provision of this Act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected but shall remain in full force and effect, and to this end the provisions of the Act are severable.

ANALYSIS BY LEGISLATIVE COUNCIL

(In compliance with A.R.S. section 19-124)

Proposition 200 would require that certain persons who are convicted of drug offenses be sentenced as follows:

1. Require that persons who commit violent crimes while under the influence of drugs serve 100% of their sentences, without eligibility for parole.

2. Require that persons who have been convicted before the proposition passes of the personal possession or use of a controlled substance such as marijuana and who are serving their sentence in prison be released on parole. A person is released on parole after serving time in jail or prison, is under the supervision of a parole officer and may have his parole revoked if any condition of parole is violated. The State Department of Corrections would be required to establish a procedure for paroling these persons. The Board of Executive Clemency would be required to release these persons unless the Board determines that a person would be a danger to the general public. Persons who are released on parole would be required to participate in drug treatment or education.

3. Require that persons who are convicted after the proposition passes of the personal possession or use of a controlled substance such as marijuana be eligible for probation. A person who is sentenced to probation does not serve any time in jail or prison, is under the supervision of a probation officer and remains free as long as the person continues his good behavior. A person on probation would be required to participate in a drug treatment or education program.

Proposition 200 would allow medical doctors to prescribe a controlled substance such as marijuana to treat a disease or to relieve the pain and suffering of a seriously or terminally ill patient. The doctor must be able to document that scientific research supports the use of the controlled substance and must obtain a written opinion from a second doctor that prescribing the controlled substance is appropriate. A patient who receives, possesses or uses a controlled substance as prescribed by a doctor would not be subject to criminal penalties.

Proposition 200 would establish the Drug Treatment and Education Fund. These monies would come from a percentage of the luxury tax on alcohol, cigarettes and other tobacco products. 50% of these monies would be transferred to Superior Court probation departments to cover the costs of placing persons in drug education and treatment programs. The remaining 50% of the monies would be transferred to the Arizona Parents Commission on Drug Education and Prevention.

Proposition 200 would establish an Arizona Parents Commission on Drug Education and Prevention. The Commission would be responsible for funding programs that increase and enhance parental involvement in drug education and treatment.

ARGUMENT "FOR" PROPOSITION 200

During my service in the Reagan Administration, I was able to participate directly in their efforts to reduce the size of government. This philosophy has broad appeal today and politicians of both parties are searching for ways to make government more efficient.

However, one area that politicians seem reluctant to examine is that of our failed drug policies. We are spending billions for prisons to incarcerate low level drug users. In the federal prison system, 61 percent of the inmates are in for drug offenses. Of the drug offenders serving in state prisons, 38 percent of them are in for simple drug possession. Nationally, the cost to build a new prison bed averages $40,000 and the cost to maintain it averages $30,000 per year.

The results would be different if prison was a disincentive to using drugs. But most wardens say that it is impossible to eradicate drugs from the prison system. A friend of mine in law enforcement once told me that the prisoners would take the "do drugs, do time" bumper stickers and slice them in half to more accurately read "do time, do drugs." HBO recently issued a documentary which featured veteran prisoners in the prison teaching younger prisoners how to manufacture methamphetamine.

I am supporting the Drug Medicalization, Prevention, and Control Act because I believe we must reform our drug policy. The Act mandates that first and second time offenders convicted of simple possession or use will

Proposition 200

receive treatment and probation as an alternative to incarceration. Treatments costs 1/8 of the cost of prison time and is certain to have a better result than incarceration during which many addicts continue to use drugs at public expense. Most importantly, the money saved on the prison spending can be invested in drug prevention for our youth.

John Norton
Former U. S. Deputy Secretary of Agriculture
Chairman, Arizonans for Drug Reform
Paradise Valley

Arizonans for Drug Policy Reform: John Norton, Chairman

ARGUMENT "FOR" PROPOSITION 200

When John Kennedy was elected President, he asked Stewart Udall, Congressman from Tucson, to be his Secretary of the Interior. Stewart brought a small cadre of Arizonans to work for him in Washington. I was lucky enough to be in the group—as Special Assistant to the Solicitor.

Young people serving in the Kennedy Administration met twice a month in an informal group called the New Frontier Club. I remember at one meeting having an extensive discussion about our drug laws. There was general consensus that the criminalization of narcotic drug use was not working — just as prohibition didn't work. We were concerned that the Government was spending a lot of money and the situation was only getting worse. I thought that the laws would be reformed soon since their failure was so obvious. That was 34 years ago!

Today, the failed drug war continues. At the state level drug control spending is over $16 billion with 80% going to the criminal justice system, and 20% to education and treatment. We need to reverse these priorities so that we spend at least the same amount on treatment and education to what we spend on enforcement and prisons.

The Drug Medicalization, Prevention, and Control Act seeks to equalize the spending on treatment and education. Rather than wasting money on prison for minor drug users, the Act invests in treatment for users and prevention for our youth.

There is strong evidence that this approach will be more effective. A Rand Corporation study in 1994 found that treatment is much more effective than enforcement and prisons in reducing cocaine use. It is time to adopt rational, cost-effective measures that deal with drugs in ways that benefit rather than harm society.

Marvin S. Cohen
Former Chairman, Civil Aeronautics Board
Treasurer, Arizonans for Drug Policy Reform
Phoenix

Arizonans for Drug Policy Reform: John Norton, Chairman